THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

March 20, 1990

Honorable Bob Bullock
Comptroller of Public Accounts
L.B.J. State Office Bldg.
Austin, Texas 78774

Open Records Decision No. 545

Re: Whether deferred compensation information is excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1919)

Dear Mr. Bullock:

As Comptroller of Public Accounts, you administer a deferred compensation plan for state agencies. V.T.C.S. art. 6252-3f. Pursuant to the Texas Open Records Act, V.T.C.S. art. 6252-17a, the Comptroller of Public Accounts has received a request for the following deferred compensation information:

> Item 1: a list of all participants in the State of Texas Deferred Compensation Plan, segregated by state agency and city;
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> Item 2: a list of all participants in the State of Texas Deferred Compensation Plan who are contributing to or have funds invested with 'inactive vendors;'
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> Item 3: the monthly amount each participant is contributing to 'inactive vendors;' and
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> Item 4: each participant's cumulative account balance with 'inactive vendors.'

You have requested a determination from this office as to whether the requested information is exempted from public disclosure by sections 3(a)(1) and 3(a)(2) of the Open Records Act. You advise this office that your records do not contain information concerning the city where each participant in the plan is located, nor do they contain the monthly amount each participant is contributing to "inactive vendors." "Inactive vendors" is not a defined term in the deferred compensation statute. You advise that the term

refers to those vendors who are not approved to sign up new participants to invest in the vendors' investment products.

Section 3(a)(1) exempts from public disclosure "information deemed confidential by law." Among other things, this exemption includes information made confidential by common-law privacy. This office has long employed a two-part test with regard to common-law privacy taken from the holding in Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977); see, e.g., Open Records Decision Nos. 506 (1988); 455 (1987). Pursuant to the Industrial Foundation test, information is protected by common-law privacy if (1) it contains highly intimate or embarrassing facts about a person's private affairs the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. Industrial Foundation, supra, at 685. In Hubert v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.) the court held that the Industrial Foundation test for information deemed confidential by law under section 3(a)(1) should also apply to section 3(a)(2).[1]

Deferred compensation plans under article 6252-3f are provided to state employees to take advantage of the tax deferment provisions of section 457 of the Internal Revenue Code. Such plans are voluntary investment plans under which amounts of compensation deferred by a participating employee, plus any income attributable to the investment of such deferred amounts, will be includible in the gross income of the participant for federal income tax purposes only when it is actually paid or made available to the participant. A plan participant may select among methods provided under the plan for investing amounts of deferred compensation. However, amounts of compensation deferred under the plan, investment products purchased with amounts deferred, and

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1. The court in Hubert expressly rejects the balancing test used by federal courts with respect to the Freedom of Information Act, 5 U.S.C. § 552, as imparting "unnecessary complexity" into the interpretation of the statute. The court held that the application of the Industrial Foundation test "will result in the proper 'balancing' of an individual's right to privacy and the articulated purpose of the Open Records Act -- that the people are entitled to full and complete information regarding the affairs of government and the acts of its officials." Hubert, supra, at 550.

income earned on such investment products must remain the property of the employing state agency subject only to the claims of the employer's general creditors. 26 U.S.C. § 457(b)(6); V.T.C.S. art. 6252-3f, § 1.07. Further, compensation for any calendar month may only be deferred if an agreement for such deferral has been entered into before the beginning of that month. 26 U.S.C. § 457(b)(4). Thus, the decision to defer the income must be made before the employee has actually earned the income and obtained an unconditional right to receive it.

The requirements of federal income tax law regarding the ownership of deferred amounts and the time of election for deferment are intended to remove deferred amounts from the application of the constructive receipt and cash equivalent doctrines. See S. Rep. No. 1263, 95th Cong., 2d Sess. 63, reprinted in 1978 U.S. Code Cong. & Admin. News 6826. While these provisions embody important technical concepts with respect to the deferral of federal income taxation, they should not obscure the fact that, for purposes of the concept of common-law privacy, an employee's participation in a deferred compensation plan represents an individual investment decision. The amounts deferred by an employee and the employee's choice of investment product represent a choice by the employee of how to dispose of his income.

This office has previously found that "all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities." Open Records Decision No. 373 (1983).

Personal investment decisions appear to be of the kind of financial information that a person of ordinary sensibilities would object to having publicly disclosed. The fact that the person is a public employee making the investment decisions through a payroll deduction program would not bear on the person's feelings in the matter. Therefore, we conclude that the information in question here satisfies the first part of the Industrial Foundation test for protection from public disclosure by common-law privacy.

The second part of the Industrial Foundation test requires the information in question to be not of legitimate

concern to the public. Clearly, the way in which the comptroller of public accounts fulfills the legislature's mandate to establish and administer a deferred compensation plan is of legitimate concern to the public. The information in question here, however, is exclusively concerned with individual employee accounts, identified by employee name.

In Open Records Decision No. 523 (1989) a number of previous open records decisions regarding financial information were reviewed, and a distinction was drawn between "background financial information furnished to a public body about an individual" and "the basic facts regarding a particular financial transaction between the individual and the public body." In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities. Open Records Decision Nos. 480 (1987); 385 (1983). For example, in Open Records Decision No. 385, noting that section 6(3) of the Open Records Act evinces a policy of full disclosure of a public body's debtors and creditors, we found that the accounts receivable of a public hospital were not excepted from public disclosure. Section 6(3) specifically makes public "information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law." Amounts deferred by employees for investment pursuant to a deferred compensation plan remain, as noted above, the property of the employing agency. The purchase of an investment product with such funds is the expenditure of public funds. However, as also noted above, the characterization of these funds as the property of a state agency is necessary for federal income tax purposes. The decision to invest, the choice of investment product, and the risk of loss all remain with the individual employee. The employee is responsible for monitoring the financial status of the vendor in whose products his deferrals are invested, the market conditions, and the amounts of his deferrals and investment income invested in a vendor's products. V.T.C.S. art. 6252-3f, § 1.08.

Thus, we conclude, lest we put form above substance, that for purposes of common-law privacy considerations, an individual's investment decisions with respect to a deferred compensation plan, including his choice of investment product and the amounts invested in a product, are not of those kinds of financial transactions that are ordinarily of legitimate public interest. While special circumstances may make private facts a matter of legitimate public concern, no

such facts are apparent here, and none have been shown. See Industrial Foundation, supra, at 685.

We now reach the question of whether a list of participants in the deferred compensation plan is excepted from public disclosure. In Calvert v. Employees Retirement Sys. of Tex., 648 S.W.2d 418 (Tex. App. - Austin 1983, writ ref'd n.r.e.), the court held that the names and addresses of retired appellate judges were not excepted from public disclosure by section 3(a)(2) of the Open Records Act. The judgment from which Calvert was appealed was decided before the effective date of Title 110b, section 25.503, now Government Code section 815.503. Hence, Calvert, which indicates that the disclosure of a list of names and addresses, per se, is not an invasion of personal privacy, was decided without regard to section 815.503. (Subsequent to Calvert, the Open Records Act was amended to allow public employees to exempt their home addresses and telephone numbers from public disclosure.) Clearly, a list of the names of all employees of a state agency, for example, would not be exempt from public disclosure. The list requested here, however, indicates additionally that the employees listed have made a specific personal investment decision, i.e., to participate in the deferred compensation program. The decision by a public employee to participate in a deferred compensation plan is a personal decision, not an official act. For the reasons discussed in this opinion with respect to other portions of the requested information, we are of the opinion that the decision of an employee to participate in the deferred compensation plan is protected by common-law privacy.

Whether a specific public employee is participating in the deferred compensation plan, whether or how much that employee is contributing to any specific vendor, and that employee's cumulative account balance with any specific vendor are not matters of legitimate public concern. It is not apparent how the legitimate public interest in the conduct of public officials and employees in the administration of the deferred compensation plan is furthered by the release of such information in a way that could not be accomplished otherwise. Therefore, we conclude that the information in question satisfies the second part of the Industrial Foundation test.

Accordingly, you may withhold the requested information. As we have resolved this matter on the basis of common-law privacy, we have not considered, and make no determination with respect to, the applicability of constitutional privacy to the information in question.

Subsequent to your initial request for an opinion in this matter, you received a second open records request, from the same requestor, reiterating, in part, the initial request and citing an informal letter opinion from this office, OR90-008, as authority for the proposition that the names of participants in deferred compensation plans are public information. You requested an attorney general opinion with respect to this second open records request.

In OR90-008 this office said that the names of employees who participate in the optional retirement plan or the tax deferred annuity plan of Texas Tech University were not protected from public disclosure by section 3(a)(1) of the Open Records Act. To the extent of any conflict, OR90-008 is overruled.

S U M M A R Y

Information regarding whether a specific public employee is participating in a deferred compensation plan, whether or how much that employee is contributing to any specific vendor, and that employee's cumulative account balance with any specific vendor is protected from public disclosure by common-law privacy.

Very truly yours,

Jim Mattox

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